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Comptroller General
of the United States

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Decision

Matter of: AIU North America, Inc.

File: B-283743.2

Date: February 16, 2000

William A. Roberts III, Esq., David O. Ferry, Esq., and William Lieth, Esq., Wiley, Rein & Fielding, for the protester.
Michael L. Burack, Esq., and Nicholas Coleman, Esq.,Wilmer, Cutler & Pickering, for Ace International, an intervenor.
Dennis J. Gallagher, Esq., Department of State, for the agency.
Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Technical evaluation was not consistent with stated evaluation factors where final assessment of technical equality unreasonably excluded from consideration a potentially significant aspect of protester's proposal that fell within the scope of the stated evaluation factors.

2. Agency failed to comply with solicitation requirement that offerors' available corporate resources would be considered as an evaluation factor where corporate entity submitting the successful proposal was acquired by another corporation after final proposals were submitted and before the source selection determination was made, and the source selection authority knew of the acquisition but did not request or obtain any documentation pertaining to the corporate resources of the acquiring corporation.

DECISION

AIU North America, Inc. protests the Department of State's (DOS) award of a contract to Ace International under solicitation No. S-OPRAQ-98-R-0040 to provide workers' compensation insurance coverage for certain DOS contractors. AIU protests various aspects of the agency's proposal evaluation, the final assessment that all proposals were technically equal, and the resulting award determination.

We sustain the protest.

BACKGROUND

The Defense Base Act of 1941 (DBA), 42 U.S.C. §§ 1651-1654 (1994), mandates a broad form of workers' compensation insurance coverage for non-U.S. government contractor personnel working on certain government contracts outside the United States. By regulation, DOS has extended the required coverage to virtually all service and construction contracts which require contractor employees to work abroad. 48 C.F.R. § 628.305 (1998).

In 1990, the DOS Office of Inspector General (OIG) issued a report reflecting an audit of DOS contractors' DBA insurance coverage. At that time, DOS contractors obtained DBA insurance independently, and their individual insurance rates varied because of differential factors such as contractor size, claims history, and work location. The OIG report concluded that DBA insurance costs could be significantly reduced if DOS awarded a blanket insurance contract to a single provider. Accordingly, DOS conducted a competition for a requirements contract under which an insurance company would guarantee uniform DBA insurance rates for all DOS contractors. Under that procurement, DOS awarded a contract to CIGNA Property and Casualty Insurance Company in May 1992; that contract was the predecessor to the contract at issue here.[1]

In 1997, the DOS OIG conducted a review of CIGNA's DBA contract. That review was conducted because "the cost of DBA insurance [under CIGNA's contract] had increased substantially . . . and Department [of State] officials had received complaints from construction contractors that the Department's DBA rates were no longer competitive." DOS OIG Report No. 97-PP-016, June 1997, at 1.[2] The OIG reviewed the DOS contract procedures, as well as procedures used by the Department of Defense and the U.S. Agency for International Development--agencies that had similar DBA insurance requirements--and concluded: "we found that the [DOS] contracting officer had not monitored contractors' claims histories to determine whether trends exist and whether corrective actions are needed to reduce claims."[3] Id. at 2. The OIG report contained two recommendations, the first of which stated:

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[1] As discussed below, Ace International, the awardee and intervenor in this protest, subsequently acquired CIGNA.

[2] The report indicated that, as of 1996, "insurance rates had increased 85 percent." Id. at 2.

[3] DOS did not, and does not, dispute this DOS OIG assessment, acknowledging in its response to this protest that "there has been no program office overseeing the [DBA] contract." Agency Report at 26. More specifically, DOS acknowledges that, with regard to monitoring claims activity under CIGNA's prior DBA contract, DOS "did

(continued...)

> We recommend that the Office of Acquisition monitor claims under the Defense Base Act insurance contract to identify trends and initiate needed improvements.

DOS OIG Report at 7.[4]

The DOS Office of Acquisition agreed with the OIG recommendations, and responded to the recommendation regarding monitoring DBA claims, stating:

> The [DOS] Office of Acquisition agrees with the OIG's recommendation to monitor claims under the Defense Base Act insurance contract. [The] Chief, Overseas Acquisition Branch will be assigned responsibility to establish a monitoring system to identify possible trends and develop appropriate improvements.

DOS OIG Report, app. C, Memorandum from DOS Office of Acquisition to DOS OIG attach (April 25, 1997).

The record shows that DOS did not, in fact, monitor the contract as it represented that it would. In responding to this protest, DOS states: "The Department . . . concedes that it has not implemented the recommendations of its Inspector General . . . that the workmen's compensation claims experience of particular Department contractors be scrutinized to see if corrective action . . . is needed." Agency Report at 30-31.

On June 15, 1998, DOS issued the request for proposals (RFP) for the contract at issue here. That RFP provided for award of a fixed-price requirements contract for a 2-year base period with three 1-year option periods and stated that, in selecting an awardee, technical merit would be more important than cost/price.[5] RFP § M.2.

(...continued)
not administer Cigna's DBA insurance contract to ensure full and timely compliance with [that contract's] report requirements." Id. at 30.

[4] The second recommendation stated that DOS should "review contractor's claims history during the preaward process when [DBA] Insurance is required and consider including contractor's claims histories as part of the proposal evaluation process." Id.

[5] Specifically, the RFP advised offerors that technical proposals would be evaluated under four factors--corporate technical experience (30 points), technical approach (30 points), business experience and management plan (20 points), and personnel qualifications (20 points)--and identified specific, equally weighted subfactors under each listed factor. RFP § M.4.

The solicitation also contained reporting requirements which DOS describes as "substantially expanded" from the reporting requirements under CIGNA's predecessor contract.[6] Agency Report at 7. The agency explains that the expanded reporting requirements "are needed to implement the recommendations of the Department's Inspector General that contractor claims histories be reviewed and corrective action taken when appropriate." Id. Consistent with DOS's stated intent to more closely monitor claims experience under the DBA contract, offerors were advised that their proposed technical approaches would be evaluated to assess, among other things, "how they will surface issues in a timely manner and at the proper levels of authority." RFP § M.4.2.B.

Regarding cost/price, offerors were required to propose fixed premium rates for construction and service contracts that would be effective during the base contract period. For each option period, offerors were required to propose fixed rates, for each type of contract, based on three different historical loss ratio scenarios.[7]

Three offerors, including CIGNA and AIU, submitted proposals by the October 13 closing date. In the section of AIU's proposal responding to an RFP instruction that offerors should demonstrate "how you will surface issues in a timely manner and at the proper levels of authority," RFP § L.13.2, part 2, AIU stated that it was proposing a [deleted] which would "provide [deleted]." Agency Report, Tab 17, AIU Proposal, Oct. 13, 1998, at 15-16.

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[6] Under the prior contract, CIGNA was to submit certain information in quarterly and semi-annual reports. The solicitation for the contract at issue here added a third annual report, and contained detailed requirements regarding additional information that each report must contain. Agency Report at 10-11, 26.

[7] "Loss ratio" was defined as the "total incurred losses divided by the estimated premium for the period in which the losses were incurred." RFP § B.3.1. Offerors were required to proposed three alternative premium rates--the first to be effective in the event the loss ratio experience prior to the option period was less than 60 percent; the second to be effective if the loss ratio was between 60 and 85 percent; and the third to be effective if the loss ratio was greater than 85 percent.

The offerors' initial technical proposals were rated using a 100-point scale with the following results:

Offeror	Technical Rating
AIU	91.6
Cigna	84.0
Offeror A	73.0

Agency Report at 18.

Thereafter, the agency conducted written and oral discussions with all three offerors. In conducting written discussions with AIU, the only aspect of its proposed technical approach about which the agency posed any questions was [deleted]. The agency asked:

> Are there any potential problems that may arise from relying on the [deleted]?[[8]] Can the effectiveness of this be rated by a third party?

Agency Report, Tab 34, Letter from Contracting Officer to AIU 2 (Apr. 20, 1999).

In response, AIU submitted information demonstrating that its proposed [deleted], and provided published articles containing [deleted]. At the GAO hearing, the TEP chair testified that the information AIU provided was responsive to the agency's questions. VT at 12:11-12:12.

Following discussions, final revisions to the three technical proposals were requested, submitted, and evaluated. The final technical point scores were as follow:

Offeror	Technical Rating
AIU	93
Offeror A	90
Cigna	89

Agency Report at 22.

By memorandum to the contracting officer dated June 17, 1999, the TEP chair summarized the panel's final technical evaluation, stating:

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[8] At a hearing conducted by GAO in connection with this protest, the technical evaluation panel (TEP) chair testified that this question was directed at [deleted] concerns. Video Transcript (VT) at 12:10.

> [AIU's] proposal demonstrated an excellent understanding of the Government's requirement and their technical approach significantly exceeds performance or capability standards. Their exceptional strengths will significantly benefit the Government. They have the capability to provide on-site presence for Defense Base Act (DBA) Insurance claims settlement within 72 hours anywhere in the world. The [AIU] team has 84 claims offices located in over 71 countries throughout the world, employing 1,392 claims technicians. [AIU] has [deleted]. This is truly an innovative and unique approach.
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> . . . . .
>
> The Cigna International's original proposal was technically acceptable. Cigna has over 5,500 employees located in over 50 countries around the world. These worldwide locations contain claims professionals who are familiar with the Defense Base Act (DBA) program. Cigna was the insurance carrier for the USAID DBA program from 1977 through July 1998 and is the incumbent insurer on the DOS program. They have a team of designated claim adjusters at their Brandywine Workers Compensation Center who specialize in adjudicating DBA & LHWCA cases.
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> . . . . .
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> On the basis of these considerations, the Panel recommends that [AIU] be awarded this contract.

Agency Report, Tab 47, Memorandum from TEP Chair to Source Selection Authority (SSA) 1-2 (June 17, 1999).

After receipt of the TEP report, the SSA performed his own independent assessment of the relative technical merits of the proposals.[9] Rejecting the TEP's conclusion that AIU's proposal was technically superior due to its "excellent understanding of the Government's requirements," its "exceptional strengths," and its "innovative and unique" [deleted], the SSA found that AIU's technical proposal was "equal in merit" to CIGNA's "technically acceptable" proposal. Agency Report, Tab 70, Source Selection Document, at 7. At the time of his determination, the SSA prepared no documentation which in any way discussed the basis for this technical assessment. Rather, the single contemporaneous statement addressing the SSA's technical assessment appears in the source selection document, stating only that: "The

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[9] The SSA testified that, following receipt of the TEP report, he did not discuss the evaluation or source selection with the TEP. VT at 10:59.

offerors' final consensus technical scores are determined to be essentially equal." As a result, the SSA selected CIGNA's proposal for contract award based on CIGNA's lower proposed rates.[10] Id.

At some point following the TEP's final evaluation but prior to the source selection, the SSA engaged in a telephone conversation with CIGNA's project manager, during which the SSA was advised that CIGNA had been acquired by Ace International.[11] VT at 11:30-11:32. No documentation was requested or submitted regarding CIGNA's change in corporate ownership. Id. On September 17, the SSA awarded a contract to Ace, and this protest followed.

DISCUSSION

AIU first takes exception to the SSA's determination that AIU's and CIGNA/Ace's proposals were technically equal. Specifically, AIU argues that the SSA's determination is not supported by any documentation that demonstrates a reasonable basis for the determination, and further that the SSA's evaluation was not based on the RFP's stated evaluation factors. We agree.

In reviewing an agency's source selection decision, we will examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5.[12] An agency which fails to adequately document its source selection decision bears the risk that our Office may be unable to determine whether the decision was proper. Id. While source selection officials

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[10] CIGNA's base period price was [deleted] percent lower than AIU's base period price, and its option prices under the alternative loss ratio scenarios ranged from [deleted] percent to [deleted] percent lower. Agency Report, Tab 71, Memorandum from Technical Support Division to SSA (August 24, 1999).

[11] The acquisition was publicly announced on July 2, 1999. AIU Protest, exh. 1, Ace News Release, at 1.

[12] The Federal Acquisition Regulation (FAR) does not apply to this procurement, since contract revenues are provided by DOS contractors rather than from DOS's appropriated funds. Fidelity and Casualty Co. of New York, B-281281, Jan. 21, 1999, 99-1 CPD ¶ 16 at 2-3. Nonetheless, even where the FAR is not applicable to a federal agency's procurement, our Office will review the agency's actions to determine that the award determination is reasonable, adequately documented, and consistent with the stated evaluation factors. See Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313 (protest sustained where the record was "devoid of any evidence" supporting responsibility determination); see also Flexsteel Indus., Inc.; Lea Indus., Inc., B-221192, B-221192.2, Apr. 7, 1986, 86-1 CPD ¶ 337.

may reasonably disagree with the ratings and recommendations of lower-level evaluators, Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107 at 6-8, they are nonetheless bound by the fundamental requirement that their independent judgments be reasonable, consistent with the stated evaluation factors, and adequately documented. In reviewing an agency's evaluation, we will consider the entire record, including testimony and documentation prepared after the source selection decision was made; however, we will accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. DynCorp, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 7 & n.13.

As noted above, the SSA prepared no contemporaneous documentation in support of his independent determination that AIU's and CIGNA/Ace's proposals were technically equal. Rather, he simply stated in conclusory form that the technical proposals "are determined to be essentially equal"---despite the TEP's assessment that AIU's proposal was technically superior due to its "excellent understanding of the Government's requirements," its "exceptional strengths," and its "innovative and unique" [deleted], while CIGNA's proposal was "technically adequate."

After counsel for AIU learned of, and specifically protested, the SSA's independent technical assessment, the SSA drafted a document stating that his determination was based on: the small disparity between technical point scores, the absence of any weaknesses or deficiencies, and the "similarity of the strengths recorded for each of the offerors." Declaration of SSA, Nov. 15, 1999, at 1-2.

Regarding his comparison of strengths, the SSA's post-protest declaration specifically addressed AIU's [deleted], indicating that the TEP's consideration of this aspect of AIU's proposal was improper because the TEP "did not indicate . . . how this innovation fit within the evaluation criteria."[13] Id. Consistent with this criticism, the SSA testified at the GAO hearing that AIU's proposed [deleted] "should not have been evaluated" because "it was not part of the evaluation criteria." VT at 11:11. Thus, in reaching his independent conclusion that the proposals were technically equal, it is clear that the SSA excluded from consideration any potential value that this aspect of AIU's proposal could provide.

We fail to see the basis for the SSA's stated belief that the proposed [deleted] fell outside the RFP's evaluation criteria. As discussed above, section L of the RFP directed offerors to discuss how they proposed to "surface issues in a timely manner," RFP § L.13.2, part 2, and section M of the RFP similarly stated that proposals "will be evaluated on . . . how they will surface issues in a timely manner

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[13] Notwithstanding his stated concern regarding the rationale for the TEP's evaluation, the SSA did not discuss any evaluation issue with the TEP after his receipt of the June 17 final TEP report. VT at 10:59.

and at the proper levels of authority." RFP § M.4.2.B. At the hearing, the SSA testified that it was his understanding that AIU's proposed [deleted] would provide [deleted] which DOS personnel would otherwise [deleted].[14] VT at 11:04-05. That being the case, we see no reasonable basis for the SSA to exclude from consideration the potential benefit of an [deleted].[15] Accordingly, the SSA's determination that the proposals were technically equal was not reasonably based on the stated evaluation factors.

AIU also protests the agency's failure to in any way consider or evaluate Ace's corporate resources following CIGNA's acquisition by Ace. AIU notes that section L of the RFP specifically required offerors to submit information to "show the relationship of the proposed project to the overall company structure," and to "describe the company in sufficient detail as to demonstrate current capabilities," including "a description of how the company is organized [and] the personnel employed." RFP § L.13.2, part 3. Section M of the RFP stated that an offeror's proposal "will be evaluated on its demonstrated availability of corporate resources." RFP § M.4.3.B.

While it is not clear that consideration of CIGNA/Ace's corporate resources, following CIGNA's acquisition by Ace, would substantively alter the agency's

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[14] The solicitation requires submission of a "Premium Report" on a quarterly basis; a "Premium/Loss Experience Report" on a semi-annual basis; and a "Loss Experience Report" on an annual basis. RFP §§ F.6.1-3. At the hearing, CIGNA/Ace's project manager testified that, under the prior contract, CIGNA's compliance with that contract's requirement for submission of a quarterly report "evolved" during contract performance to the point that this report was submitted only semi-annually. VT at 10:12-21.

[15] In his declaration responding to this protest issue, the SSA stated: "It does not appear to me that "[deleted] is . . . something the Department would benefit from," Declaration of SSA , Nov. 15, 1999, at 2. At the GAO hearing, the SSA effectively retracted this statement, first testifying, "I'm not sure I would say [deleted] wouldn't provide a benefit to the government," VT at 11:10, acknowledging, as noted above, that the system would [deleted], and concluding, "I can't say it [deleted] would not benefit the government." VT at 11:13. In this regard, the TEP chair testified that he believed AIU's proposed [deleted] would provide savings of time, promote productivity and generally benefit the government. VT at 12:12.

evaluation,[16] the record shows that nothing in CIGNA's proposal was submitted for evaluation after the acquisition by Ace, and that certain portions of the material in CIGNA's proposal which described its corporate resources related to elements of the prior CIGNA parent corporation which were not transferred to Ace. VT at 10:31-10:32.

Our Office has long held that once offerors are informed of the criteria against which proposals will be evaluated, the agency will be required to adhere to the stated criteria. Grey Adver., Inc., B-184825, May 14, 1976, 76-1 CPD ¶ 325 at 14. Here, the record is clear that the agency did not evaluate the corporate resources of Ace--the entity to which the agency knowingly awarded the contract. Accordingly, we must conclude that the agency's evaluation failed to consider the "availability of corporate resources" as required by the RFP. The fact that the agency did not obtain information regarding Ace's acquisition of CIGNA until after the agency had completed its evaluation of proposals does not absolve the agency of its obligation to evaluate proposals consistent with the stated criteria. Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD¶ 133 at 6.

Finally, AIU protests that the agency's evaluation of past performance considered only the extent of offerors' experience in performing particular tasks rather than the

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[16] Ace submitted a declaration from its program manager, stating:

> Since CIGNA's acquisition by ACE, the persons responsible for administering the DBA program are the same persons who were responsible for the administration of the program before the acquisition, and they continue to perform the same functions. The size of the staff involved in administering the program has increased since the acquisition. Also, since the acquisition, two rating companies – A.M. Best Company and Moody's—have raised their ratings of the operations.

Declaration of Ace Program Manager, Nov. 12, 1999, at 2.

On the other hand, AIU notes that Ace's own news release, issued on July 2, stated:

> Savings are expected to result from a combination of staff and corporate overhead reductions together with the outsourcing of the information technology (IT) function. ACE expects that personnel reductions for the acquired companies will be in the range of 15% and will follow a measured process that will begin immediately.

AIU Protest, exh. 1, Ace News Release, July 2, 1999, at 2.

quality of prior performance.[17] In raising this issue, AIU relies on a provision in section L of the RFP which advised that each offeror "will be evaluated on its performance . . . under existing and prior contracts for similar products or services," and that the evaluation "will focus on information that demonstrates quality of performance." RFP § L.13.2, part 3.

The agency responds that, as initially issued, section M of the RFP had contained language similar to the section L provisions quoted above, but that the agency had specifically deleted that language in an amendment to the solicitation prior to submission of proposals, replacing it with provisions for evaluating the extent of an offeror's experience in performing particular tasks. Accordingly, the agency maintains that it properly considered only the extent of offerors' experience in evaluating past performance.

In light of the fact that the agency amended section M of the RFP to delete the specific provisions on which AIU relies for this portion of its protest, AIU's argument, at best, identifies a patent ambiguity in the solicitation regarding the manner in which past performance would be evaluated. An offeror who chooses to compete under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Wackenhut Servs., Inc., B-276012.2, Sept. 1, 1998, 98-2 CPD ¶ 75 at 4-5. On this record, we will not further consider this issue.

In summary, based on our conclusions that the SSA's determination that the proposals were technically equal was not reasonably based on the solicitation's stated evaluation factors, and the agency's failure to consider the availability of Ace's corporate resources as required by the solicitation, the protest is sustained.

We recommend that DOS reopen negotiations with the offerors to permit submission of revised proposals, including Ace's submission of appropriate corporate resource information. Prior to reopening negotiations, DOS may wish to review the solicitation to ensure that it reflects the agency's requirements and adequately advises offerors how proposals will be evaluated. If, upon evaluation of final revised proposals, an offeror other than Ace is determined to offer the best value to the government, DOS should terminate Ace's contract for the convenience of the government and make award to the successful offeror. We also recommend that AIU be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999). AIU should

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[17] AIU argues that, based on CIGNA/Ace's acknowledgment that it did not submit all of the reports required under the prior contract, see note 14, supra, a qualitative analysis of past performance would have decreased CIGNA/Ace's technical rating.

submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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